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CITATIONS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No.———

CASSIUS M. MCDONALD, PETITIONER,

v.

WALTER A. HUNTER, WARDEN OF THE UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Cassius M. McDonald, respectfully petitions the Honorable the Supreme Court of the United States, that writ of certiorari issue to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment of said court dated February 18, 1947, reversing the District Court of the United States for the District of Kansas and ordering the return of this petitioner to the custody of the respondent Warden.

OPINIONS BELOW.

The opinion and judgment of the District Court are contained in the record (R. 16-19). Opinion of the Circuit Court of Appeals reversing the District Court dated February 18, 1947 (R. 53, 54), 159 F. 2d 861.

JURISDICTIONAL STATEMENT.

Decision of the lower court was dated February 18, 1947.

Jurisdiction exists under Section 240 of the Judicial Code as amended, Title 28, U. S. Code, Sec. 347; *Waley v. Johnston,* 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302.

This case involves an important question of federal constitutional and statutory law, which has not been, but should be, settled by this court.

Petitioner had served several years of a fifteen year sentence when in 1940 he filed a habeas corpus case in the Federal Court in Kansas, and was discharged. He was out of the prison 511 days pending appeal and application for certiorari, during which time he was under bond and surveillance (R. 33, 34). His release in 1940 was by a court having jurisdiction of the person and subject matter; this jurisdiction continued pending appeal and until recommitment. The judgment was valid until reversed. Petitioner was released in custody of the law and subject to all of the restraints incident to the power and jurisdiction of the Federal Courts. The decision of the Circuit Court of Appeals is premised on the theory that a prisoner who initiates habeas corpus and obtains his release is at fault, occupies the position of a prisoner who has escaped. The effect of the holding is to burden and impair the efficiency of the writ of habeas corpus. The great writ for the protection of liberty becomes a snare and a delusion. The term of the sentence is extended by the decision of the Circuit Court of Appeals in violation of the prisoner's rights

under the Fifth Amendment. Conflict exists between this decision and the cases of *Albori v. United States*, 9 Cir., 67 F. 2d 4; *White v. Pearlman*, 10 Cir., 42 F. 2d 788; *Harris v. Lang*, 27 App. D. C. 84, Syl. 4. And, petitioner's term having commenced, the decision conflicts with *U. S. v. Murray*, 275 U. S. 347, 72 L. Ed. 309, 313, 48 S. Ct. 146. Construction of the Constitution, Art. 1, Sec. 9, Par. 2 and the Statutes, Title 28, U. S. Code 451 et seq preserving the privilege of habeas corpus is involved.

QUESTIONS PRESENTED.

Where a federal prisoner petitions for habeas corpus and the Court has jurisdiction of his person and of the action and enters an order discharging him from custody under bond pending appeal, and the order is reversed on appeal and the prisoner recommitted, Is he entitled to credit on his sentence for the period of time from date of discharge to date of recommitment?

Petitioner contends that he is entitled to such credit. That a federal sentence to a term of imprisonment which has commenced to run continues to run and cannot be prolonged or extended by the courts, and that a contrary rule takes liberty in violation of the Fifth amendment, denies equal protection of the laws, denies the constitutional and statutory remedy of habeas corpus and burdens the efficiency of said constitutional writ.

A Federal District Court's determination under Title 28, U. S. Code 461, that law and justice require that petitioner be discharged from custody, is conclusive on the facts.

Prisoner's deductions for good conduct under Title 18, U. S. Code 710, are "from the term of his sentence."

STATEMENT OF MATTER INVOLVED.

Petitioner was convicted in the Federal District Court, St. Paul, Minnesota, on an indictment charging conspiracy to kidnap, transport and hold for ransom. This conviction was upheld on appeal. *McDonald v. United States,* 89 F. 2d 128. Certiorari denied, 301 U. S. 697, and petition for rehearing denied, 302 U. S. 773. His sentence was fifteen years. Service of sentence commenced Feb. 1, 1936. On June 6, 1940, an order was entered in a habeas corpus proceeding in the Federal District Court in Kansas discharging him from custody. He gave bond (R. 17, 44), conditioned that he abide the judgment of the appellate courts. The Tenth Circuit Court of Appeals reversed. *Hudspeth v. McDonald,* 120 F. 2d 962. Mandate was stayed pending petition for certiorari. Certiorari was denied. October 30, 1941, petitioner surrendered himself and was delivered back to the custody of the Warden. Petitioner was out of the penitentiary 511 days.

On May 23, 1946, the present case was filed (R. 3-10). On the day set for the hearing, June 13, 1946, petitioner filed an amended petition (R. 10, 11) alleging that petitioner's sentence of fifteen years commenced to run February 1, 1936, and

> "That under Title 18, U. S. Code 710 he is entitled to a deduction from the term of his sentence of ten days for each month, and that under Title 18, U. S. Code 713, he is entitled to be discharged at

> the expiration of his term of sentence less the time so deducted."

and that a fifteen year sentence commencing February 1, 1936, with such deductions would be served on or before February 26, 1946. That petitioner had observed the rules and was entitled to the deductions.

Government's return to the amended petition (R. 12-15) recites the history of petitioner's trial and conviction and prior habeas corpus cases and that "the petitioner was at large and at liberty for a period of 511 days, for which time petitioner is not entitled to credit upon service of his sentence."

Hearing was had before the Honorable Arthur J. Mellott, United States District Judge, District of Kansas. At said hearing, petitioner and the record clerk at the penitentiary gave oral testimony and certain documentary exhibits were offered on behalf of the Respondent Warden (R. 23-49). On August 19, 1946, said District Court filed his Memorandum Opinion holding that with statutory deductions for good conduct petitioner had served his sentence and order was entered discharging him from custody (R. 16-20). The order (R. 19) provided that petitioner would be subject to "all provisions of law relating to the parole of United States prisoners", and "that execution of this order be stayed for a period of ten days from this date if in the judgment of the Board of Parole and prison authorities such period of time is requisite to effectuate his release under the statute of the United States with reference to paroled prisoners."

Judgment of the trial court gave petitioner credit upon his sentence for the 511 days he was out. It did not have the effect of giving petitioner good time deductions based upon said 511 days. There is no question involved concerning right to good time based upon the time he was out.

The government appealed to the Tenth Circuit Court of Appeals, and February 18, 1947, the opinion of that court was filed (R. 53, 54) reversing the trial court and directing petitioner's return to the custody of the Warden.

Petitioner submitted to said Circuit Court of Appeals a petition for rehearing and in the alternative for stay of mandate (R. 56-59). Filing of the petition for rehearing was denied as out of time, and stay of mandate was denied (R. 55).

REASONS FOR GRANTING THE WRIT.

This case presents important questions of practice and substance touching the writ of habeas corpus; important too for its bearing on prison administration and as pertaining to the criminal law. The Circuit Court of Appeals holds that a sentence to a term of imprisonment can be satisfied only by actual imprisonment without qualification. It fails to distinguish a decision of the Ninth Circuit, *Albori v. United States,* 67 F. 2d 4, holding that a sentence to imprisonment was satisfied without the defendant ever setting foot inside the federal penitentiary. The decision conflicts, too, with *White v. Pearlman,* 10 Cir., 42 F. 2d 788; *Harris v. Lang,* 27

App. D. C. 84; *In re Jennings*, 118 Fed. 479; *McPike v. Zerbst*, 21 F. Supp. 961. Basic premise of the decision is unsound. The premise is that a prisoner who avails himself of a constitutional remedy resulting in exercise of jurisdiction by a court and his discharge from prison, is at fault. That he occupies the status of a prisoner who has escaped. This basis for the decision is out of harmony with the origin and history of the writ, and the perpetuation of the remedy in the Federal Constitution and Statutes. The decision conflicts with Rule 45 of this court and Title 28, U. S. Code 464, providing for bail and restraint of prisoner pending review of decision discharging him.

Discharge from custody by writ of habeas corpus results through the assertion of judicial power. *Eagles v. United States*, 328 U. S. .., 91 L. Ed. 252, 255, 67 S. Ct. 313, and cases cited therein. The petitioner is not guilty of escape, technical or otherwise. *Ex parte Eley*, 130 Pac. 821, 9 Ok. Cr. 76.

Jurisdiction of the Federal Court attached to this petitioner and he was amenable to that jurisdiction continuously from his discharge until recommitted. He was in custodia legis. This dominion of the court's jurisdiction and the dominion of bail was a continuance of the original imprisonment. *Taylor v. Taintor*, 83 U. S. 366, 21 L. Ed. 287, 290, 36 S. Ct. 242; *Sibray v. United States*, 185 F. 404; *Stallings v. Splain*, 253 U. S. 339, 343, 64 L. Ed. 940, 943. He was a party to a proceeding in court. He was subject to control of the court. Rule 45. There existed physical power to control.

The decision of the Circuit Court of Appeals extends the term of imprisonment and violates the Fifth Amendment. *Acme Poultry Corp. v. United States,* 146 F. 2d 738, (Cert. Den. 324 U. S. 860).

Petitioner having entered upon service of his sentence, courts were powerless to extend term. *United States v. Murray,* 275 U. S. 347, 72 L. Ed. 309, 313; *United States v. Benz,* 282 U. S. 304, 307, 51 S. Ct. 113, 75 L. Ed. 354.

When petitioner is credited on his sentence for the time out on the writ, he will have served a fifteen year sentence less deductions for good conduct, under 18 U. S. Code 710. This is so without crediting him with such deductions based upon the time he was out. Good conduct deductions once earned become a matter of right. *Carroll v. Squier,* 136 F. 2d 571, (Cert. Den. 320 U. S. 793).

Effect of Supreme Court Rule 45 and the Statute, Title 28, U. S. Code 461, and the other questions presented here are deserving of this Court's consideration.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals, Tenth Circuit, according to law, to the end that this cause be reviewed by this Court; and that the judgment of the said Tenth Circuit Court of Appeals in the said cause be reversed by this Court, and for such further relief as to this Court may seem proper.

CASSIUS M. MCDONALD, Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1366

CASSIUS M. MCDONALD, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 53–54) is reported at 159 F. 2d 861. The opinion of the district court appears at R. 16–19.

JURISDICTION

The judgment of the circuit court of appeals was entered February 18, 1947 (R. 55). The petition for a writ of certiorari was filed May 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1940 petitioner was discharged from custody pursuant to an order of the district court in a habeas corpus proceeding. On appeal by the respondent, the order of the district court was reversed and thereafter petitioner resumed service of his sentence. The question presented is whether petitioner is entitled to credit on his sentence for the 511 days during which he was at large on bond while the appeal was pending.

STATEMENT

In January 1936, petitioner was convicted in the United States District Court for the District of Minnesota upon a charge of conspiracy, in violation of the Federal Kidnaping Act (18 U. S. C. 408a, 408c), and he was sentenced to imprisonment for fifteen years.[1] He commenced service of the sentence on February 1, 1936. (See R. 42–43.)

On June 6, 1940, the United States District Court for the District of Kansas entered an order (R. 43–44) granting petitioner's application for a writ of habeas corpus and discharging him from custody, provided that he furnish bond conditioned on his complying with the final judgment of the appellate court.[2] Petitioner

[1] The conviction was affirmed on appeal (*McDonald* v. *United States*, 89 F. 2d 128 (C. C. A. 8)), and this Court denied a petition for a writ of certiorari. 301 U. S. 697.

[2] The court held that petitioner had been deprived of the effective assistance of counsel and that the convicting court lacked venue.

furnished bond (R. 44–45), and he was released from the respondent's custody in compliance with the order of the district court.

On appeal by the respondent, the Circuit Court of Appeals for the Tenth Circuit reversed the order of the district court with instructions to that court to direct that petitioner be returned to the warden's custody. See *Hudspeth* v. *McDonald,* 120 F. 2d 962, certiorari denied, 314 U. S. 617. Accordingly, on October 30, 1941, petitioner resumed service of his sentence (see R. 45–46). Petitioner was out of prison a total of 511 days as a result of the order of the district court discharging him from custody (R. 26). His sentence would have been fully served, less good time credits, on February 26, 1946, instead of July 22, 1947, if there had been no interruption in the service of the sentence (R. 15, 26, 47).

On the basis of these facts, petitioner filed on May 23, 1946, a petition (R. 3–10), and on June 13, 1946, an amended petition (R. 10–11) for a writ of habeas corpus in the United States District Court for the District of Kansas alleging that his sentence had been fully served. Respondent filed a return (R. 12–15) and a hearing was had. On August 19, 1946, the district court entered an order discharging petitioner from respondent's custody on conditional release (R. 19–20). In a memorandum opinion (R. 16–19), the court held that even though petitioner had

not been in custody, he was entitled to credit on his sentence for the 511 days during which the earlier habeas corpus case was pending on appeal. Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, this order of the district court was reversed with instructions to the district court to discharge the writ and direct the return of petitioner to the custody of respondent (R. 53–54, 55).

ARGUMENT

Arguing that the requirement of a bond conditioned on his compliance with the judgment of the circuit court of appeals constituted a continuation of the original imprisonment, petitioner urges that he was in legal effect serving his prison sentence during the 511 days he was at liberty while the appeal was pending. The contention is not novel. A similar argument was urged in *Morgan* v. *Ward,* 248 Fed. 691, almost thirty years ago, and the Circuit Court of Appeals for the Eighth Circuit flatly rejected it with the reminder that "Imprisonment in the penitentiary is a reality. It cannot be taken by absent treatment." This Court denied a petition for a writ of certiorari (247 U. S. 521), and the contention enjoyed a deserved repose until petitioner resurrected it.

We think it plain that a judgment directing the imprisonment of a defendant for fifteen years means that he shall be imprisoned for that term,

less whatever credits he earns in prison.[3] The concept of imprisonment does not comprehend the situation of one who is set at liberty without restraint or condition other than that he shall abide by the final decision in his case. As the court below points out (R. 54), this is not a case like *White* v. *Pearlman*, 42 F. 2d 788 (C. C. A. 10), upon which the district court relied (see R. 17–18). Because of error, the prisoner in that case was "ejected" from prison over his objection that his term had not been fully served. When the error was discovered, the court, in effect, estopped the warden from asserting it, and the prisoner's term was treated as not having been interrupted by his undesired "ejection" from prison. Here, on the other hand, petitioner initiated the habeas corpus proceeding and obtained his release because the district court adopted his view of the law. To accept petitioner's argument would mean that when a

[3] Cf. Act of June 29, 1932, 47 Stat. 381, c. 310 (18 U. S. C. 709a) which provides:

"The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

prisoner who is serving his sentence is later released on bail pending final decision of his appeal, as in *Gibson* v. *United States,* 327 U. S. 769, he continues to serve his sentence although he is at liberty. There is nothing in the law and nothing in policy considerations which require so absurd a result.

In an analogous situation, it has been held that a prisoner who delays the commencement of his sentence while appellate proceedings are pending is not entitled to credit for the time he spends in jail pending decision of his appeal. *Dimmick* v. *Tompkins,* 194 U. S. 540; *Baker* v. *United States,* 139 F. 2d 721 (C. C. A. 8); *Baker* v. *Hunter,* 142 F. 2d 615 (C. C. A. 10), certiorari denied for mootness, 323 U. S. 740;[4] *DeMarois* v. *Hudspeth,* 99 F. 2d 274 (C. C. A. 10), certiorari denied, 305 U. S. 656. In dealing with the question whether a parole violator is entitled to credit on his sentence for the time he was on parole, a more difficult question than the one in this case, this Court has held that he is not entitled to such credit, pointing out that "mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." *Anderson* v. *Corall,* 263 U. S. 193, 196. Cf. *Zerbst* v. *Kidwell,* 304 U. S. 359.

[4] This Court had earlier denied a petition for certiorari filed in this case before judgment in the circuit court of appeals. See our brief in opposition in No. 700, O. T. 1943, 321 U. S. 789.

None of the decisions relied upon by petitioner (Pet. 6–7) as being in conflict with the decision below involved the question presented by this case, and none lays down principles of law which conflict with the principle applicable here.

CONCLUSION

A prison sentence is served by imprisonment or other restraint, such as parole. During the 511 days in question, petitioner was neither imprisoned nor subject to parole supervision. He was free of restraint and subject only to an obligation to obey the decision of the circuit court of appeals. Petitioner has not fully served his sentence, and the circuit court of appeals therefore properly reversed the order of the district court. We respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947